Attachment to
Construction Industry Comments
re: proposed Ventura County MS4 permit

Building Industry Association of Southern California, Inc. (BIA/SC)

Integration of Low Impact Development Measures and CEQA Approvals

May 29, 2008

In recent months, at least one of Southern California's regional water quality control boards have put forth proposals aimed at requiring local governments to impose fixed "low impact development" ("LID") numerical requirements on a lot-by-lot basis on all development within their respective jurisdictions. LID concepts generally involve designing and engineering real estate developments, and incorporating storm water best management practices, such that both (i) the water quality effects of increased storm water volume resulting from construction of impervious surfaces are minimized or mitigated, and (ii) the off-site hydrological impacts of the development are minimized. LID numerics attempt to quantify such concepts by, for example, specifying that new development and redevelopment projects must be mitigated by reducing impervious surfaces, or increasing percolation, infiltration, storage or evapotranspiration such that no more than (for example) 5% of the total project area is effectively impervious.

BIA/SC is eager to foster improvement in real estate development and redevelopment practices concerning LID. However, faced with proposals to impose of one-size-fits-all numeric LID requirements, such as fixed and absolute Effective Impervious Area (EIA) or erosion potential (Ep) requirements, we are opposed to such impositions. This is not to suggest that the LID numerical measures cannot be put to very good use. To the contrary, evolving LID metrics of this type are useful, so long as physical development constraints and land use and environmental policy implications relevant to their application can also be taken into account. LID metrics should therefore be integrated into land use/environmental approvals for development projects.

Despite the potential usefulness of metrics, we oppose the imposition of any strict and absolute numeric mandates, for example, the 5% maximum EIA or the maximum Ep=1 limitation, as generally-mandated restrictions. Our opposition is based on our view that there are many situations where relevant physical site and water quality characteristics, and/or competing land use and environmental policy considerations, would warrant deviation (large or small) from strict compliance with numeric LID requirements – whether for infill, redevelopment, or undeveloped land.

This position paper sets forth the current views of BIA/SC's staff concerning two areas of thought. Both relate to the integration of LID water quality metrics into California's longstanding and highly evolved land use environmental review and

approval process, which is mandated and governed by the California Environmental Quality Act ("CEQA"). In this first section below, emphasis is on *chronologically* synchronizing the application of LID mandates with CEQA review and approvals, which we feel is imperative. Second, looking more at the substantive effects of regulation (i.e., affecting outcomes), we discuss the potential integration of MS4 permit LID metrics into the CEQA review and approval process. We believe that such synchronization and integration with CEQA will permit reasonable consideration of appropriate LID requirements exceptions based on consideration of physical constraints, feasibility, and the availability of scalable solutions.

I. Synchronizing application of MS4 LID measures with the CEQA *process.*

We believe that synchronizing CEQA review and application of MS4 Permit LID objectives is necessary for several reasons. First, to be timely applied, LID water quality metrics should be taken into account **as early as possible** in land use planning and development design processes. Second, the introduction of LID metrics should not unduly complicate the already challenging land use and environmental review, permitting and approval process. Third, LID metrics should not be imposed in ways that undermine vested project design approvals that are already settled pursuant to CEQA. Therefore, rather than impose water quality LID metric standards apart from CEQA, regulators wishing to impose LID metrics should instead direct proper attention to them at the right stage of the land use and environmental approval process: *during* CEQA.

CEQA compliance is required by law whenever a California public agency proposes to carry out or approve any discretionary plan or project, including private land use and development projects. For example, any approval of a city's or a county's comprehensive general plan must be in compliance with CEQA, as must other discretionary actions (such as the decision of a city to annex additional land, or approve zoning, tentative tract maps, or other development applications). Each such discretionary action where CEQA compliance is required presents an opportunity for LID considerations to be brought to bear.

In general, CEQA compliance is designed to assure that local agencies regulate activities so that major consideration is given to preventing environmental damage and protecting environmental quality. Cal. Pub. Res. Code § 21000(g); 21001. To comply with CEQA, public agencies must analyze projects as provided by the Act to identify the potentially significant effects of the project on the environment, to identify and evaluate alternatives to the project, and to identify and evaluate mitigation measures to avoid, reduce and mitigate impacts of the project on the environment.

Further, CEQA compliance assures meaningful public disclosure of potentially significant project effects on the environment and available mitigation measures, and provides the opportunity for comments and input regarding the project and its effects on the environment by the public and other agencies, including responsible and trustee agencies protecting California's resources. *See, e.g.,* Cal. Pub. Res. Code §§ 21002,

21003, 21080.3, and 21091. Perhaps most importantly, and unlike other environmental review statutes, CEQA requires that public agencies shall not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen the significant environmental effects of the project (Cal. Pub. Res. Code § 21001); and the Act further requires the incorporation of all feasible mitigation measures prior to approval of any discretionary project that will result in unavoidable significant adverse affects. Cal. Pub. Res. Code § 21081.

Besides being applicable to proposed discretionary approvals related to *general* planning and potentially sweeping governmental steps like large annexations of land for potential future project development, CEQA is the pivotal and conclusive step in the private *project* planning process. As the California Supreme Court explained long ago:

> [W]e have consistently interpreted CEQA to authorize, indeed to require, environmental review of private projects **at the earliest possible stage**. The CEQA Guidelines embody this principle as well. Thus, **EIRs and Negative Declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment**.

Napa Valley Wine Train, Inc. v. Public Utilities Com., 50 Cal.3d 370, 398-99 (1990) (internal quotations and citations omitted, emphasis added). *See also* Cal. Pub. Res. Code §21003.1. Because CEQA review should take place at the optimal time to influence a private project's design, conditioning and approval, and when mitigation can best be addressed, LID considerations should be taken into account then as well.

Therefore, we hope that any adopted LID numeric standards would be imposed and applied only in *chronological* (i.e., procedural) synchronicity with CEQA approvals. Stated differently, any imposition of LID metric standards by any of the regional water boards should both "grandfather" vested private project approvals and govern future CEQA analysis and project approvals. Without appropriate grandfathering and chronological and procedural integration, strong industry resistance against otherwise acceptable impositions should be expected.

II. Criteria for waivers or exception from of LID numeric requirements based on site-specificity, feasibility, alternative scalable solutions, project scale, and project type.

If a regional water quality control board were to impose fixed LID numerical limitations for land development within its jurisdiction, many questions would naturally arise about physical and environmental conditions that would warrant exception to such fixed standards. In light of recent proposals by regional water boards, BIA/SC's staff has reflected on these questions, and has attempted to set forth for consideration a slate of "waiver conditions" or "exceptions" which could apply to absolute LID numeric standards. The exercise has clarified our view of a dichotomy between (i) the

opportunity for site-specific balancing and tailoring of LID practices to physical and environmental conditions that is possible under CEQA, and (ii) the futility of efforts to develop a fixed, precisely-described slate of waiver conditions or exceptions that can sufficiently address the many factors that should be considered when considering LID metrics to determine sufficiency of LID measures.

Specifically, as we worked to prescribe a fixed slate of waiver conditions, we continued to recognize the many different circumstances in which site-specific characteristics should be taken into account. Given our recognition of this fact, we would expect that any fixed slate of numeric LID standards, coupled with equally fixed, numeric waiver provisions or exceptions, would likely be objectionable to various camps at the outset – simply because they would fail to take into account both (i) the broad array of potential differing site-specific characteristics and physical conditions, and (ii) the wide spectrum of policy considerations that influence land use and environmental decisions.

As we tried to develop such a slate of waiver provisions, we therefore found ourselves constantly reflecting on the CEQA approach – not just in terms of *chronology* and process, but also in terms of CEQA's substantive approach to site-specificity and tailoring to account for feasibility. That is because CEQA requires focused consideration of the individual physical site characteristics and the specific design and plan for each proposed project, as well as evaluation of project-specific impacts. In addition, CEQA requires environmental mitigation tailored to the specific physical and development characteristics and impacts in each instance. Essentially, the level and degree of informed tailoring that CEQA requires is much more than the level and degree of tailoring that one could achieve through developing and agreeing upon a prescriptive, static slate of waiver criteria, drafted into a county-wide MS4 permit.

The following, brief description of CEQA may help to explain our desire to use CEQA in concert with the MS4 permit as the means to advance LID metrics. Under CEQA, virtually all individual projects and plans (e.g., parcel maps to comprehensive general plans) that may result in significant environmental impacts are required to undergo an "environmental impact" analysis. For relatively simple projects, a lesser degree of analysis is appropriate, resulting in a negative declaration (or mitigated negative declaration) based upon appropriate findings. However, whenever any interested citizen presents a "fair argument" of any significant environmental impact, a full environmental impact report ("EIR") is required, complete with the fielding of public comments, the provision of responses thereto, a public hearing, etc.

Importantly, the processes for both negative declarations and EIRs have opportunities for public participation and inter-agency involvement. Affected agencies such as regional water boards can and should participate in the CEQA processes: (i) *anecdotally* if possible by commenting on any particular plan or project, and (ii) *formulaically* through the establishment of relevant "thresholds of environmental significance" for matters within their respective expertise. Established thresholds of environmental significance in turn drive both (i) the level of required environmental analysis, and (ii) required levels of mitigation.

Also under CEQA, the agency that is primarily responsible for approving and conditioning any project or plan must require the incorporation of mitigation measures to avoid, reduce or minimize significant environmental impacts. If significant, unmitigated environmental impacts likely will remain despite such requirements, then the lead agency may approve the project only upon if it makes two sets of further findings: First, the agency must find that, with respect to each unavoidable significant environmental effect, (a) changes or alterations have been required or incorporated into the project that mitigate or avoid significant effects, (b) those changes or alterations are within the responsibility or jurisdiction of another public agency, and/or (c) specific considerations or circumstances make additional mitigation measures infeasible. Second, the agency must find that the societal benefits of the project outweigh the residual environmental impacts.

Frankly, BIA/SC's member companies are not especially fond of the CEQA process. As a process, it is arduous, costly, and frequently abused by critics of development. Therefore, it is ironic that BIA/SC's staff finds itself touting CEQA as essential to the orderly and wise advancement of LID concepts. We do so because, in addition to the need for chronological and procedural integration discussed above, substantively, CEQA's best attribute is the potential to *balance* and to *tailor* the conditioning and approval of, and development of mitigation measures for any project to its site specific circumstances. The ability to *tailor* and require all reasonably feasible mitigation measures can best assure that sensible LID measures are required and that non-sensible LID measures are not required.

Against this backdrop, we feel that the best approach would be for regional water boards to use MS4 Permits to establish selectively-applicable and presumptive LID thresholds of environmental significance for use in the CEQA process. For example, through the permit, a regional board could make Ep = 1.2 a presumptive threshold of environmental significance for certain larger scale projects, and mandate application of the "hydromodification analysis study" (HAS) process to larger developments and comprehensive plans.[1] CEQA would then operate procedurally to require environmental analysis of all larger scale projects where there is a fair argument that Ep > 1.2 in the post-development condition. Pursuant to CEQA, the analysis would have to evaluate the significance of hydro-modification impacts in light of specific project physical and environmental conditions.

Substantively, unless the required HAS were to lead to finding that there would be no significant environmental impacts from allowing an even higher Ep value,[2] the

---

[1] The HAS process is complicated and expensive – too much so to apply to smaller projects and individual infill projects. Accordingly, we would urge limiting its application to very large projects and also to larger-scale general and watershed planning (which would ultimately influence smaller projects).

[2] We know from experience that there are projects where robust engineering and environmental analyses can show that a project-scale Ep value in excess of 1.2 will

analysis must identify and evaluate appropriate mitigation to reduce of environmental impacts to below the presumptive level of significance, wherever feasible. Thus, a regional water board could impose the LID numeric standard (Ep = no more than 1.2), both to assure proper assessment of potential impacts and to identify and incorporate of mitigation; but the imposition would not be an inviolable absolute. Instead, the board could impose the measure where appropriate such that, presumptively, it must be (i) achieved where it is reasonably feasible to do so, and (ii) approached as nearly as feasible where achievement is infeasible – in each case by operation of CEQA.

A similar approach could likewise convert the proposed 5% EIA limit from an absolute requirement to a presumptive CEQA threshold, which can trigger CEQA analysis to assure mitigation is appropriately incorporated to the greatest extent warranted and feasible through the CEQA process. Here as well, we would hope that the regional water boards would make the 5% EIA threshold of significance selectively applicable only to the larger projects impacting theretofore undeveloped lands which are likely to impact surface water quality in a potentially significant and adverse way. For example, small projects, infill projects, projects that would improve upon baseline conditions, projects that drain into regional BMPs, and the like, should be expressly exempt from application of such 5% EIA presumptive threshold of significance.

III. Conformity between California's CEQA review and approval of new development and redevelopment projects and federal regulations pertaining to MS4 permits and post-construction storm water pollution.

The federal regulations pertaining to MS4 permit applications and land use planning and development approval processes and outcomes discuss "structural and source control measures to *reduce* pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system...." 40 C.F.R. § 122.26(d)(2)(iv)(A) (emphasis added). Specifically concerning land use planning and post-construction storm water pollution, 40 C.F.R. § 122.26(d)(2)(iv)(A)(2) requires in relevant part (emphasis added) the MS4 permit applicant to provide:

---

nonetheless avoid significant environmental impacts (due to the site characteristics, the nature of downhill lands and downstream waters, natural morphologic characteristics, and the like). Accordingly, any prescribed threshold of significance should be "presumptive" rather than absolute, so that mitigation toward the selected threshold is not required when it does not serve to avoid significant environmental impacts. For example, concerning imperviousness, where a project is proposed for development on exposed natural bedrock, there may be no negative environmental impact from failing to provide for disconnection and percolation. By establishing a threshold of significance at EIA = 5% which is presumptive, the presumption can be appropriately negated upon a proper showing of facts. Moreover, by making the threshold presumptive, interested citizens could still put forth a "fair argument" that the threshold of significance should be even lower in appropriate instances, consistent with CEQA case law and guidelines.

> A description of *planning procedures* including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls *to reduce* pollutants in discharges from municipal separate storm sewers after construction is completed.

These federal regulations indicate neither (i) that strict maintenance of the *status quo* is the *sine qua non* of all land development and redevelopment, nor (ii) that the EPA Administrator (or its authorized state surrogate) must assert project-specific control over all land use planning and projects in order to define the "maximum extent practicable" pollution-avoidance measures. Instead, the regulations require the MS4 applicant to provide a proposed management program which:

- "shall include *a comprehensive planning process* which involves public participation and where necessary intergovernmental coordination, *to reduce* the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate." 40 C.F.R. § 122.26(d)(2)(iv) (preamble) (emphasis added); and

- describes "procedures of site planning which incorporate consideration of potential water quality impacts." 40 C.F.R. § 122.26(d)(2)(iv)(D).

We believe that CEQA – as a process – fulfills these requirements, including public participation, intergovernmental coordination, and most importantly a very specific, case-by-case determination of what design and mitigation measures are appropriate in light of potential water quality impacts.

* * * *